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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NOS. 78 AND 88.

CHICAGO & SOUTHERN AIR LINES, INC.,

AND

CIVIL AERONAUTICS BOARD, *Petitioners*,

V.

WATERMAN STEAMSHIP CORPORATION, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

BON GEASLIN,
Attorney for Respondent.

Of Counsel:

FRANCIS H. INGE,
JOSEPH M. PAUL, JR.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ON WRIT OF CERTIORARI

To The

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

(1) The basic question presented by this case is whether the plain language of Section 1006(a) of the Civil Aeronautics Act of 1938, that "Any order * * * issued by the Authority (Board) under this Act, except any order in respect of any foreign air carrier subject to the approval of the President * * *, shall be subject to review by the circuit courts of appeals of the United States * * *,"

means what it says, or whether it denies to the courts jurisdiction to review an order of the Civil Aeronautics Board, which has been approved by the President, granting a certificate of public convenience and necessity authorizing overseas or foreign air transportation.

(2) Whether the Congress deprived the courts of their inherent power to review questions of law as to whether the Civil Aeronautics Board in granting a certificate of public convenience and necessity complied with the terms of the statute, simply by providing that the issuance or denial of such certificate shall be subject to the approval of the President.

(3) Petitioner, Chicago & Southern Air Lines, Inc., has raised the additional question as to whether the filing of the Petition for Review was timely although filed within sixty days of the final order of the Civil Aeronautics Board.

THE STATUTE.

For the convenience of the Court, we summarize below the pertinent provisions of the Civil Aeronautics Act of 1938[1] relating to the statutory pattern which the Congress has established for the authorization of persons to engage in air transportation. The Congress has made a basic distinction in the Act between "air carriers" and "foreign air carriers", and has legislated differently with respect to each of such class of carriers. The distinction is important to keep in mind, because it has a determinative effect upon the question to be decided.

Broadly speaking, the Act applies to air transportation the same plan of certificates of convenience and necessity, which Congress had applied to railroads in paragraphs 18 to 20 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920,[2] and which it

[1] Act of June 23, 1938, 52 Stat. 977, 54 Stat. 1233, 54 Stat. 1235, 49 U. S. C. 401, *et seq.*

[2] Act of February 28, 1920, c. 91, 41 Stat. 477, 478, 49 U. S. C. 1 (18-20).

had followed as to telephone, telegraph and commercial radio communication in the Communications Act of 1934,[3] and as to motor carriers in the Motor Carrier Act of 1935,[4] and as to water carriers in the Transportation Act of 1940.[5]

The provisions of the Civil Aeronautics Act in respect of certificates of public convenience and necessity are found in Section 401. (49 U. S. C. Sec. 481)

Section 401(a) (49 U. S. C. Sec. 481(a)) is a general prohibition. "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation."

Section 401(b) (49 U. S. C. Sec. 481(b)) provides that "Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require."

Section 401(c) (49 U. S. C. Sec. 481(c)) provides that upon the filing of any such application, the Civil Aeronautics Board[6] shall post a notice thereof in the office of its secretary and give notice to such other persons as it may by regulation determine; also that any interested person may file a protest or memorandum of opposition

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[3] Act of June 19, 1934, c. 652, 48 Stat. 1075, 57 Stat. 11, 47 U. S. C. 214.

[4] Act of August 9, 1935, c. 498, 49 Stat. 551, 52 Stat. 1238, 54 Stat. 923, 49 U. S. C. 306.

[5] Act of September 18, 1940, c. 722, 54 Stat. 941, 49 U. S. C. 909.

[6] Prior to July 1, 1940, the Civil Aeronautics Board was known as the Civil Aeronautics Authority. It is so referred to in the Civil Aeronautics Act of 1938 (49 U. S. C., Sec. 401, *et seq.*). The change of name was effected by the President's Reorganization Plan No. IV, 5 Fed. Reg. 2421-2422. Petitioner Board will, throughout this brief, be referred to as the Board except that, in the case of extracts from or paraphrases of the Act, it will be referred to as "The Authority."

to or in support of the issuance of a certificate. The section further provides that "Such application shall be set for public hearing."

Section 401(d) (49 U. S. C. Sec. 481(d)) enunciates the standards which are to govern the action of the Board in issuing certificates. It is provided that "The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

As heretofore stated, Section 401(a) is a prohibition upon an "air carrier" from engaging in "air transportation" without a certificate of public convenience and necessity. The quoted terms are defined in Section 1 (49 U. S. C. Sec. 401). Paragraph (2) of that Section defines "air carrier" to mean "*any citizen* of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." Paragraph (10) of Section 1 defines "air transportation" to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." These terms are defined in paragraph (21). "Interstate air transportation" means, broadly speaking, air transportation between places in different states or between places in the same territory or possession. "Overseas air transportation" means air transportation between the continental United States and a territory or possession or between different territories or possessions. "Foreign air transportation" means air transportation between a place in the United States and a foreign country.

While the provisions of Section 401 apply equally to "interstate," "overseas" and "foreign" air transportation, the section thus relates entirely to the conduct of

air transportation *by citizens* of the United States. A foreign company is not an "air carrier" but a "*foreign air carrier.*" (Section 1(19).) A "foreign air carrier" may not engage in "interstate" or "overseas" air transportation at all. It may engage in "foreign" air transportation only as provided in Section 402 of the Act (49 U. S. C. Sec. 482). Under that section it must obtain, not a "certificate of public convenience and necessity" provided for in Section 401, but a "permit" pursuant to Section 402. Under Section 402(b), the Board is "empowered" but not required to issue a permit, upon making certain findings.

Section 406 (49 U. S. C. Sec. 486) authorizes the Board to fix rates for the transportation of mail by an "air carrier" and prescribes the procedure and standards by which such rates are to be fixed. Section 406(f) (49 U. S. C. Sec. 486(f)) provides that no foreign air carrier may be paid a rate of compensation for transporting mail between the United States and any foreign country which will result in such foreign air carrier receiving a higher rate of compensation than such foreign country pays to air carriers under the United States flag for transporting its mail between such foreign country and the United States.

The Petition for Review herein was filed under Section 1006(a) of the Civil Aeronautics Act. This reads as follows (49 U. S. C. Sec. 646):

> "Judicial Review of Authority's Orders
> Orders of Authority Subject to Review
>
> Sec. 1006. (a) Any order, affirmative or negative, issued by the Authority under this Act, *except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act*, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by

leave of court upon a showing of reasonable grounds for failure to file the petition theretofore." (Italics ours)

The primary question raised by the Petitioners appears to arise from Section 801 of the Act (49 U. S. C. Sec. 601), which is as follows:

"The President of the United States

Sec. 801. The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401(e) or any permit issuable under section 402(c) or to the original terms, conditions, or limitations of any such certificate or permit."

STATEMENT OF THE CASE.

(a) Procedural Steps.

On December 19, 1940, Waterman Airlines, Inc., a subsidiary of the Respondent here, filed its verified application with the Civil Aeronautics Board under the provisions of Section 401 of the Civil Aeronautics Act for a certificate of public convenience and necessity, authorizing it to engage in the scheduled air transportation of persons, property and mail between the terminal points of New Orleans, Louisiana, and San Juan, Puerto Rico, via the intermediate point of Tampa, Florida. The application was designated as Civil Aeronautics Board Docket No. 525.

Subsequently, on June 26, 1941, and September 27, 1943, Waterman Airlines, Inc., filed amendments to its original application which, among other things, eliminated that part of its application for authority to transport mail. On February 9, 1944, the application was further amended by substituting the name of Waterman Steamship Corporation, (hereinafter referred to as "Waterman"), the Respondent here, as the applicant. Waterman for many years has operated a steamship service between New Orleans, Louisiana, and San Juan, Puerto Rico, with cargo vessels equipped to carry twelve passengers.

On October 5, 1942, Chicago and Southern Air Lines, Inc., (hereinafter referred to as "C & S") filed with the Board its verified application for a certificate of public convenience and necessity, authorizing scheduled air transportation of persons, property and mail over various routes in the Caribbean and Central American areas, which application was designated as Docket No. 798. Subsequently, various amendments were filed by C & S to its application for a certificate authorizing scheduled air transportation of persons, property and mail over several routes in the Caribbean, Central and South American areas, which included a route between New Orleans, Louisiana, and San Juan, Puerto Rico, via certain specified intermediate points in foreign countries.

On or about December 6, 1943, the Board consolidated for hearing, under the designation of Docket No. 525, *et al.* (hereinafter referred to as the "*Latin American* Case", 6 C.A.B. 857) some 29 applications which had been filed by 15 applicants for modifications of existing certificates of public convenience and necessity, and for new certificates authorizing scheduled air transportation services on various routes between the United States and Mexico, Central America, Latin America, and the Caribbean area.

Hearings were held before Examiners of the Board on September 18 through October 13, 1944. The Report of the Examiners was served on the parties on March 5,

1945. Exceptions and briefs in support thereof were filed, and oral arguments were heard by the Board from April 30 to May 5, 1945.

On May 6, 1946, more than eighteen months after the close of the hearing and before the Board had issued or denied any certificate of public convenience and necessity in the proceeding, Waterman filed its Motion to Reopen the Proceeding to Receive Further Evidence and for Reargument. (R. 100) This Motion was denied by the Board by its Order Serial No. 4795, served upon Respondent on May 24, 1946, (R. 114). On the same date the decision and order of the Board, Serial No. 4793, granting a certificate to C & S and denying Waterman's application was served. Thereafter, within the time prescribed by the Regulations of the Board, (R. 290) Waterman filed its Petition for Rehearing and Reconsideration, which Petition was by the Board's Order No. 4977, denied on July 12, 1946. (R. 328)

On September 6, 1946, Waterman filed in the United States Circuit Court of Appeals for the Fifth Circuit its Petition for Review of the Orders and Opinion of the Board referred to above. Under date of November 4, 1946, the Board filed its Motion to Dismiss the Petition for Review or in the Alternative to Affirm the Board's Orders (R. 27) and its Motion to Withhold Certification and Filing of Record (R. 33). On October 30, 1946, C & S filed its Motion for Leave to Intervene (R. 354). The Motion was granted by Order of the Court dated November 8, 1946. (R. 358) On November 22, 1946, Waterman filed its Answer to the Motion of the Board to Withhold Certification and Filing of Record (R. 360), to which was attached Exhibit No. 1, Exhibit No. 2, and Exhibit No. 3 which are important to the consideration of this case. On November 29, 1946, C & S filed its Motion to Dismiss the Petition for Review, or in the Alternative to Affirm the Orders of the Civil Aeronautics Board. (R. 388) On December 2, 1946, the Board filed its reply and support-

ing memorandum on Motion to Withhold Certification and Filing of Record. (R. 399)

On January 27, 1947, the case was called on the Motions filed by the Petitioners here to Dismiss the Petition for Review, which Motions were on February 14, 1947, denied. (R. 413) The decision of the Court below was in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Pan American Airways Co.* v. *Civil Aeronautics Board, et al.* 121 F. (2d) 810. Certiorari was granted June 16, 1947. (R. 414)

(b) The Orders Sought to be Reviewed, and Issues Raised.

Waterman seeks judicial review of three orders of the Board. The first of these was the order of the Board dated May 17, 1946, Serial No. 4793. This order granted the application of C & S for a certificate of public convenience and necessity under Section 401 of the Civil Aeronautics Act (49 U. S. C. Sec. 481), authorizing air transportation between the co-terminals Houston, Texas, and New Orleans, Louisiana, and the terminal point San Juan, Puerto Rico, by way of several specified intermediate points in foreign countries. The order also denied the application of Waterman for a certificate of public convenience and necessity authorizing transportation by air of persons and property between the terminal points New Orleans, Louisiana, and San Juan, Puerto Rico, via Tampa, Florida. This order was approved by the President on May 22, 1946, and served on May 24, 1946.

The second order sought to be reviewed is likewise dated May 17, 1946, served May 24, 1946, and bears Serial No. 4795. It was not approved by the President. This order denied the Motion of Waterman to Reopen the Proceeding in Civil Aeronautics Board Docket No. 525, *et al.*, insofar as it related to the proposed service between New Orleans, Louisiana, and San Juan, Puerto Rico, for the purpose of receiving further evidence and reargument.

The third order (which was not approved by the President), is dated July 12, 1946, and bears Serial No. 4977. This order denied the petition of Waterman for a rehearing and reconsideration of the findings of fact and decision of the Board in Civil Aeronautics Board Docket No. 525, *et al.*, and in particular for a reconsideration of the orders of the Board dated May 17, 1946, bearing Serial Nos. 4793 and 4795, referred to above.

Although the language of Section 1006(a) of the Civil Aeronautics Act is perfectly clear, the Board and C & S, the Petitioners here, contend that the decision and orders of the Board are not subject to judicial review by reason of the fact that the Order granting the Certificate was approved by the President.

The Petition for Review, therefore, raises important questions concerning the construction of Section 401 of the Civil Aeronautics Act as to the criteria governing the requirements of public convenience and necessity; the adequacy of the evidence to support the findings of the Board, with respect to fitness, willingness and ability of C & S; whether evidence adduced at hearings that closed in October, 1944, could possibly support the findings and orders of the Board under the wholly changed conditions, as shown by the record, when the Board issued its orders dated May 17, and July 12, 1946; and whether the action of the Board, under such circumstances, by its Order No. 4795, dated May 17, 1946, and served May 24, 1946, denying a petition that the record be reopened to enable Waterman to present evidence as to the effect of events since the close of the hearing, was not such an abuse of discretion as to constitute a "denial of right" within the doctrine of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248.

SUMMARY OF ARGUMENT.

I. Section 1006(a) of the Civil Aeronautics Act provides that any order of the Board, except an order in respect of any foreign air carrier subject to the approval of the President, shall be subject to judicial review. The orders sought to be reviewed in this case do not relate to a foreign air carrier. They concern an air carrier, which must meet the requirements of the provisions of the Civil Aeronautics Act before the Board may lawfully grant to it a certificate to engage in overseas or foreign transportation. The granting of certificates of public convenience and necessity under the Civil Aeronautics Act is a regulation of commerce and does not fall within the scope of the President's constitutional control of the conduct of international relations.

The decision of the United States Circuit Court of Appeals for the Second Circuit in *Pan American Airways Co. v. Civil Aeronautics Board, et al., supra,* was erroneous. The Congress considered and rejected language which might be subject to the construction adopted by that Court and urged by the Petitioners here.

The efforts of Petitioners to liken the issuing of certificates of convenience and necessity by the Civil Aeronautics Board to the conduct of our international relations, with respect to which the President alone has the power to act, is without merit. The foreign water-borne commerce of the United States has been subject to international agreements and treaties from the beginning of the government. The Merchant Marine Act, 1936,[7] provides that the United States Maritime Commission may enter into contracts for the payment of operating differential subsidies to operate vessels on essential routes in the foreign commerce of the United States. These bear great similarity in their overall effect to certificates of public convenience and necessity issued by the Civil Aeronautics Board authorizing overseas and foreign air transporta-

[7] Act of June 29, 1936, c. 858, 49 Stat. 2001, 46 U. S. C. 1171 *et seq.*

tion. These subsidies are based upon the difference in operating costs between vessels under the United States flag and similar competing vessels under foreign flags. Additional subsidies may be granted by the United States Maritime Commission to offset the effect of governmental aid paid to foreign competitors. Those provisions go to the very heart of our relations with other countries as they affect shipping, and it is possible that they could result in a "shipping war" leading to grave international consequences. Yet the Congress has not provided for the participation of the office of the Chief Executive in the granting of such subsidies.

A determination as to which particular American air carrier should be authorized to operate an airline in interstate or overseas air transportation, or even to a foreign country, is not a question which is committed to the exclusive control of the President by the Constitution, any more than a determination as to which steamship company shall be given a subsidy to operate in foreign commerce. We need not consider whether the question could have been committed by the Congress to the exclusive decision of the President, because that was not the course which the Congress and the President pursued. They placed responsibility for decision in an independent agency and made the granting of certificates subject to Presidential approval and to judicial review. The latter provision was no more unconstitutional than the former.

The fact that the Board or the President may reach the same conclusion upon a reconsideration of the case which they reached in the first instance, is no ground for denying judicial review. There is no more reason to assume that the Board or the President will disregard the judgment of this Court than that lower courts may do so.

II. The power to regulate commerce is in the Congress and when it has legislated the courts have an inherent power to see that the terms of the statute are observed.

The Civil Aeronautics Board may not disregard the provisions of the statute and issue an order without substantial evidence to support its findings. The Congress provided for judicial review of such questions in order to make sure that the Civil Aeronautics Board complies with the statute and does not base its orders upon arbitrary or extra-legal considerations.

III. The Petition for Review was filed within sixty days after the final order of the Civil Aeronautics Board. The filing of a petition for rehearing suspends the running of the time within which the petition for review may be filed.

ARGUMENT.

I.

THE CIVIL AERONAUTICS ACT UNMISTAKABLY CONFERS UPON THE COURTS JURISDICTION TO REVIEW THE ORDERS OF THE BOARD WHICH ARE INVOLVED IN THIS CASE.

(a) The Language of the Act Negatives the Interpretation Sought To Be Given It by the Board and C. & S.

We have previously quoted Section 1006(a) of the Act, pursuant to which the Petition for Review in this case was filed. The language is as broad as it possibly could be. "Any order, affirmative or negative," is made subject to judicial review with the single exception of "any order in respect of any *foreign air carrier*" subject to the approval of the President under the provisions of Section 801 of the Act.

An order granting or denying a certificate of public convenience and necessity comes plainly within the scope of this language.

The Petitioners here, following the decision in *Pan American Airways Co.* v. *Civil Aeronautics Board, et al., supra*, seek to graft an additional exception upon the provisions by suggesting that the language ought to read "except any order subject to the approval of the President

as provided in Section 801 of this Act." This collides head-on with the fact that Congress itself made an exception to the generality of the opening phrase, and made the exception much narrower than that for which counsel contend. It did this by excepting from judicial review "any order in respect of any *foreign air carrier* subject to the approval of the President as provided in Section 801 of this Act." (Italics ours) As previously pointed out, a "foreign air carrier" is a foreign citizen. None of the orders here under consideration relates to a "foreign air carrier."

It is a well recognized rule of statutory construction that the specification of one exception indicates a legislative intention to exclude all others. *Bend* v. *Hoyt*, 13 Pet. 263, 271-272; *Dubuque Electric Company* v. *City of Dubuque, Iowa*, 260 F. 353 (C. C. A. 8th). Exceptions from a general provision in statutes are to be strictly construed. *Hartford Electric Light Co.* v. *Federal Power Com.*, 131 F. (2d) 953, (Cert. Den. 319 U. S. 741).

The language of Section 1006(a) thus completely refutes the decision of the Circuit Court of Appeals for the Second Circuit, and the arguments urged upon this Court, that the Congress excepted from judicial review orders dealing with interstate, overseas or foreign air transportation which are subject to approval of the President under Section 801. The case is not as it would be if Section 1006 had been completely silent as to the review of such orders. Instead, when Congress enacted, and the President approved the Civil Aeronautics Act, they made a sharp division, for the purpose of judicial review, between the various orders of the Board that were subject to approval of the President under Section 801. Orders granting or denying *permits* to foreign citizens were not to be reviewed by the courts. Orders granting or denying *certificates* to United States citizens were to be subject to judicial review. By express language, orders granting or denying certificates to United States citizens that were

subject to approval under Section 801 were made reviewable to precisely the same extent as orders granting or denying certificates that were *not* subject to such approval. The citizenship of the carrier, not the necessity of approval under Section 801, was made the test of reviewability. Implications alleged to arise from the general scheme of the Act cannot prevail against the specific language used. The meaning of a statute must first be sought in the language employed. If that be plain, as it is here, the Courts will enforce it, if it is within the constitutional authority of the legislative body which enacted it *United States* v. *Standard Brewery*, 251 U. S. 210; *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607.

(b) The Legislative History of Sec. 1006(a) Demonstrates That the Congress Provided Exactly What It Intended.

The Congressional purpose as manifested by the text of Section 1006(a) is not rendered doubtful by legislative history which only confirms what Congress has formally said. *Addison* v. *Holly Hill Fruit Products, supra.* Such history reinforces the perfectly clear language of Section 1006(a) of the Act by showing that the Congress deliberately rejected a provision which, if it had been adopted, might have had the result for which the Petitioners here contend.

The original bill, which later became the Civil Aeronautics Act of 1938, excepted from judicial review *all* orders of the Board in respect of *foreign air transportation* approved by the President under Section 801—whether such orders related to operations by United States air carriers or by foreign air carriers. In that Bill, S. 3845, introduced by Senator McCarran on April 14, 1938, in the 75th Congress, 3d Session, Section 1006(a) read in part as follows:

> "Sec. 1006. (a) ORDERS OF AUTHORITY (BOARD) SUBJECT TO REVIEW.—Any order, affirmative or negative, issued by the Authority (Board) under this Act, ex-

cept an order in respect of foreign air transportation approved by the President as provided in section 801 of this Act, shall be subject to review . . . ".

However, in the bill as reported by the Committee on Commerce of the United States Senate, on April 19, 1938, the first few lines were changed to read as follows (the part struck through being eliminated and the part in italics being added):

> "Sec. ~~1006~~ 1005. (a) ORDERS OF AUTHORITY (Board) SUBJECT TO JUDICIAL REVIEW.—Any order, affirmative or negative, issued by the Authority (Board) under this Act, except ~~an~~ *any* order in respect of *any* foreign air ~~transportation approved by~~ *carrier subject to the approval of* the President as provided in Section 801 of this Act, shall be subject to review . . . ."

The bill was enacted in this form.

In other words, the Congress deliberately changed the language of the bill so as to narrow the exception to the general principle of judicial review. Petitioners now seek to enlarge the exception even beyond the form which the Congress considered too broad. The language, however, is so plain in its commands as to leave no doubt as to its meaning.

We assume it will not be questioned that an order of the Board, similar to those involved here with respect to air transportation, granting a citizen of the United States a certificate to engage in air transportation between New York State and the State of California, is subject to judicial review. *Federal Radio Commission* v. *Nelson Brothers*, 289 U. S. 266; *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 79 App. D. C. 341, 147 F. (2d) 152. In such a case the court can establish the proper construction of the provisions of the Act dealing with all the questions involved in this case. But, under the decision in the *Pan American Airways* Case, *supra*, and the contentions here, an order granting the same citizen a certificate to engage in air transportation

between two points in Hawaii, or between New Orleans, Louisiana, and San Juan, Puerto Rico, is not subject to judicial review; and the Board, in determining the latter case, would be free to ignore a decision as to the meaning of identical words in the Act laid down by the court in the former case. All this is said to result in the case of certificates to operate beyond the continental limits of the United States, because Congress provided that orders of the Board with respect to such certificates shall be subject to the approval of the President.

Petitioners' argument really comes down to an assertion that while the Civil Aeronautics Act vests in the Board the power to issue certificates for air transportation between points in different States and to do so only upon carefully defined procedures and standards, the Congress and the President intended that the vast subject of certificates for air transportation between the United States and a foreign country, between the United States and a territory, between territories, or between points in the same territory, should be left almost completely at large.

If the Congress and the President had any such intention at the time of the enactment of the Civil Aeronautics Act, they certainly concealed it in a most remarkable fashion.

II.

THE ORDER GRANTING THE CERTIFICATE TO C & S DOES NOT PRESENT A QUESTION DEALING WITH ACTION WHICH, APPROPRIATELY BELONGING TO THE EXECUTIVE PROVINCE, IS NOT THE SUBJECT OF JUDICIAL REVIEW.

(a) The Courts Have Freely Passed Upon Acts of Administrative Agencies Dealing With Foreign Commerce.

The Court in the *Pan American Airways* case, *supra*, seems to have reached the conclusion that the Congress did not intend to provide for judicial review of orders such as we have here, because, as stated by the Court, the respon-

sibility for the conduct of our international relations is committed exclusively to the President. In that case the Court said (page 814):

> ". . . It seems incredible that in enacting Section 1006(a) Congress intended to permit a review of the action of the Board to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. (Citing cases). The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in Executive discretion that it cannot be regarded as authorized by Section 1006(a)."

That decision and the argument of Petitioners here confuse the power of the President over foreign affairs with the power of the Congress to regulate commerce between the several states and with foreign nations. They completely disregard the historic facts with respect to the conduct of our trade and communications with other countries, and the cases relied upon by Petitioners and by the Court in the *Pan American Airways* case, *supra*, do not support the conclusions contended for.

We are not dealing here with a proclamation of the President which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action. Neither the Congress nor the Courts have ever regarded the licensing power, even though it may concern transportation or communication with a foreign country, as an exclusive function of the President.

In *United States* v. *Western Union Telegraph Company*, 272 F. 893 (C. C. A. 2), the Court recognized this when it said: (p. 894)

> "Concededly the right to permit or to prohibit the landing of cables between foreign countries and the American coast is in Congress, under its power to

regulate commerce between the states and between the states and foreign countries. In point of practice Congress on several occasions has done so by acts of Congress and sometimes the President had done so as Chief Executive, and sometimes cables have been laid by corporations without any permit at all."

The Interstate Commerce Act applies to commerce between the United States and foreign countries. *United States* v. *Grand Trunk Ry. Co.*, 225 F. 283, *Galveston H. & San Antonio Ry.* v. *Woodbury*, 254 U. S. 357, *Western Union Telegraph Co.* v. *Esteve Bros. and Co.*, 256 U. S. 566. That Act contains no provisions for Presidential approval of orders of the Commission, and the Courts have repeatedly reviewed its orders relating to the foreign commerce. *Lewis Simas Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654; *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179.

The Congress has also entrusted the Federal Communications Commisison with powers to deal with matters concerning the foreign commerce of the United States. The courts in many cases have passed upon its action in such cases. *Mackay Radio & Telegraph Co.* v. *Federal Communications Commission*, 97 F. (2d) 641 (App. D. C.). As the Court said in *Z. & F. Assets Realization Corporation* v. *Hull*, 311 U. S. 470, 489: "The question in this relation is simply one of the intent of Congress as disclosed by the Act." That the Congress has provided for judicial review of the Board's orders which we have here is perfectly clear.

The Board argues that an understanding of the intimate relationship of overseas and foreign air transportation to international relations and national defense contributes materially to an understanding of the necessity for subjecting the action of the Board in this field to the authority of the President and of the unsuitability of the subject for judicial review (Brief, p. 15, No. 88).

C & S in its brief follows the same theme. That argument erroneously assumes, first, that the Congress in the

enactment of the Civil Aeronautics Act, after years of study, and after hearings extending over several sessions, was lacking in an understanding of the relationship of such transportation to international relations and national defense, and, second, that the character of overseas and foreign air transportation is so different from other forms of transportation and communication by which our commercial intercourse with other nations is conducted, that it falls in the category of foreign affairs, with respect to which the President alone has the power to speak or listen as a representative of the nation.

The Petitioners have cited numerous treaties or agreements existing or being negotiated between the United States and foreign countries with respect to conduct of air transportation between such countries. They seek to liken the issuance of certificates of public convenience and necessity authorizing overseas and foreign air transportation to such agreements, and argue that the issuance of such certificates are exclusively the function of the Chief Executive under his powers to conduct the foreign relations of the United States. But such is not the case. The foreign water-borne commerce of the United States has been, since the founding of the nation, subject to innumerable treaties, agreements, protocols and other arrangements, and yet Congress granted the United States Maritime Commission the power to enter into operating differential subsidy contracts without providing for Presidential review.

International air transportation in its initial stages was accorded infinitely more freedom than was ever afforded the conduct of foreign commerce by sea.

The international aspects of foreign air transportation have only recently become evidenced by agreements or treaties. On the other hand, the foreign commerce of the United States on the high seas has been subject to international agreements and treaties since its inception. Probably the first of these was the treaty of Amity and Com-

merce entered into between the United States and France in 1778 which amounted to a bilateral treaty between the two countries, guaranteeing to the citizens and the ships of the contracting parties equal rights and entry to the respective countries and ports. Equally well known are the treaties containing the so-called most-favored-nation provision, which are by far the most numerous of the overseas commerce treaties of the United States, and which provide that the contracting parties agree to extend equally favorable rights and privileges to each other as provided for in similar treaties entered into with the most favored nation of either of the contracting parties.

The attempt of the Petitioners, therefore, to attach special significance to the certificates of public convenience and necessity authorizing overseas or foreign air transportation by reason of the existing international air transport agreements, is without merit. The necessity for and existence of the international air transport agreements does not place the power to grant such certificates exclusively in the office of the Chief Executive. The conduct of the foreign commerce of the United States by sea is subject to, and dependent upon international agreements or treaties to the same extent as foreign commerce by air.

Title VI of the Merchant Marine Act, 1936, concerns the granting by the United States Maritime Commission of operating differential subsidies to operate vessels on essential routes in the foreign commerce of the United States. Such contracts bear great similarity in their overall effect to the certificates of public convenience and necessity issued by the Board authorizing foreign air transportation. They are vastly more intimately connected with our relations with foreign countries than certificates authorizing overseas and foreign air transportation. This is because the subsidies authorized are based upon the difference in operating costs of vessels under the United States flag and the operating costs of similar vessels under foreign

flags. (Sec. 603(a), Merchant Marine Act, 1936, 46 U. S. C., Sec. 1173, 49 Stat. 2002). Compensation for the transportation of mail by aircraft in foreign commerce is not fixed upon a basis that so closely involves our relations with other countries. The Merchant Marine Act goes even further and provides in Section 604, as amended (46 U. S. C., Sec. 1174, 49 Stat. 2003, 52 Stat. 959, 53 Stat. 1185), that the Maritime Commission, after consultation with the Secretary of State, may grant such additional subsidy as it determines to be necessary to offset the effect of governmental aid paid to foreign competitors. Those provisions go to the very heart of our relations with other countries as they affect shipping. Such provisions could result in a "shipping war" leading to grave international consequences. There is no comparable provision in the Civil Aeronautics Act of 1938. Yet the Merchant Marine Act contains no provision for the participation of the office of the Chief Executive in the issuance or granting of such subsidy contracts, and authorizes the Commission to consult with the Secretary of State only in those instances relating to the granting of countervailing subsidies. He is given no power to veto or approve the Commission's decisions.

It is submitted that there is no basic difference between the conduct of the foreign commerce of the United States by air or by sea. Both are subject to and governed by the terms of existing international agreements or treaties. If Congress can entrust the granting of licenses to engage in foreign commerce by sea to an administrative agency alone, Congress could have likewise legislated identically with respect to foreign commerce by air. It is clear, therefore, that there is no constitutional inhibition against subjecting to judicial review the orders of the Board with respect to the issuance of certificates authorizing overseas and foreign air transportation.

This Court has recognized the propriety of judicial review of administrative determinations in matters far more

closely affecting the conduct of foreign relations than does the granting of a certificate of public convenience and necessity to operate an airline to a foreign country. Thus, although the power to exclude or expel aliens has been defined to be "a power affecting international relations", it has never been questioned that the courts may be invested with power to review administrative action, the Supreme Court saying in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713, 714 (1893):

> "It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit."

Still more striking is the decision in *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, sustaining a statute which submitted for judicial determination the question whether certain monies paid to the Secretary of State by the Mexican Government pursuant to an award of a commission appointed to settle various claims of United States citizens, had been obtained by fraud. The Court said at page 462:

> ". . . Both branches of the Government were concerned in the enactment subjecting that question to judicial determination, and it cannot properly be said that the President, by approving the act of 1892 or by recognizing its binding force, surrendered any function belonging to him under the supreme law of the land."

See also *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272.

(b) The Order Granting the Certificate to C & S Is the Order of the Board.

The power under the Constitution to regulate commerce being in the Congress, it is not one of the exclusive attributes of the office of the Chief Executive. Therefore, the Congress may delegate the power to issue licenses to engage in the foreign and domestic commerce of the United States to an administrative body, and make such licenses as relate to overseas, or foreign air transportation, or air transportation within or between territories or possessions of the United States subject to the approval of the President, as it has done in the Civil Aeronautics Act.

Nothing in Section 401 of the Act suggests any basic difference in the procedure for handling applications for certificates to engage in foreign air transportation, overseas air transportation, and air transportation between points in the same territory, on the one hand, and applications to engage in air transportation between the states, on the other. Section 401(a) refers to "a certificate issued by the Authority." Section 401(b) directs that "application for a certificate shall be made in writing to the Authority", and Section 401 (c) requires that "the Authority shall dispose of such application." Section 401(d) directs that "the Authority shall issue a certificate" on making the findings therein specified.

That section deals with all types of air transportation indiscriminately. Section 801 modifies the procedure in a case of applications for certificates to engage in the three types of air transportation referred to therein only in the following respects: (1) Copies of applications are to be transmitted to the President before hearing thereon; (2) Decisions by the Board are to be submitted to the President before publication thereof; and (3) the issuance or denial of the certificate "shall be subject to the approval of the President." However, the certificate is issued or denied by the Board upon findings of fact made by it, because no one but the Board can issue a certificate. The President is not required to make any findings or

determinations or to issue any proclamation as is the historic practice in instances dealing with powers appropriately belonging to the executive province.

We may be sure that if the Congress had intended to impose upon the President the burden of issuing certificates for the types of air transportation specified, it would have found apt language in which to express that intention.

It may be conceded that the Congress may not subject to judicial review a matter committed by the Constitution to the exclusive control of the President. We assume, for example, that the Congress could not provide for review of the President's decision to recognize a particular foreign government. But determination as to which particular United States citizen should be authorized to operate an airline to a territory or possession of the United States, or even to a foreign country, is not a question of that sort. Indeed, it is a question over which, until 1938, no agency of the government had any control.

We need not consider whether, when governmental control was determined to be desirable, the question could have been committed to the exclusive decision of the Executive. This was not the course which the Congress and the President pursued. They placed the responsibility for decision in an independent agency and made its acts subject both to Presidential approval and to judicial review. The latter was no more unconstitutional than the former.

The Congress and the President enjoined upon the Board a course of procedure and certain rules of decision in the performance of it function. The Board must pursue such rules and procedure and show a substantial compliance therewith to give validity to its action. When, therefore, the statute requires as a condition precedent to its order that the findings of fact made by it be supported by substantial evidence, the validity of the order must rest upon that condition. If as a matter of law, substantial evidence is lacking, the order is ineffective. *Wichita R. & Light Co.*

v. *Public Utilities Commission*, 260 U. S. 48; *Chicago Junction* case, 264 U. S. 258; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. The approval by the President of an order of the Board which it had no authority to issue cannot give such order any legal effect.

The President, in approving action by the Board, must necessarily have assumed that the Board had properly carried out the mandate imposed on it by a statute which the Congress had enacted and the President had approved. If the Court should determine that the Board had erroneously construed the statute or had otherwise departed from the rules which the Congress had laid down, that decision would not involve judicial scrutiny of the President's action. It would simply mean that the Board ought not to have proceeded to secure Presidential approval at all. It is not to be assumed that the President would desire such a certificate to stand.

(c) The Decisions Cited by the Court in the Pan American Airways Case, and Relied Upon by Petitioners Here Are Not Applicable.

The Court in the *Pan American Airways* case, *supra*, in support of its decision that judicial review of the Board's orders granting a certificate is precluded, cited *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, and *United States* v. *Belmont*, 301 U. S. 324. These cases are not authority for the Court's conclusion.

In the *Curtiss-Wright* case, the Court upheld, as against a claim of unconstitutional delegation of power, a joint resolution of Congress (48 Stat. 811) authorizing the President, upon certain findings by him and after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, to impose by proclamation an embargo upon the sale of arms and munitions of war to countries engaged in armed conflict. The Court in that case was careful to point out that the whole aim

of the resolution was to affect a situation *entirely external* to the United States and falling within the category of foreign affairs. The Court said: (p. 319)

> ". . . In this vast external realm with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."

The resolution under consideration by the Court in that case was far different from "An Act to Create a Civil Aeronautics Authority and to Promote the Development and Safety, and to Provide for the Regulation of Civil Aeronautics", enacted under the Commerce Clause of the Constitution.

In the *Curtiss-Wright* case, *supra*, there was confided to the President "an authority which was cognate to the conduct by him of the foreign relations of the government". *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Such authority in origin and essential character is quite different from that over internal affairs, such as determining *which* United States citizen applicant may, under a law enacted pursuant to the Commerce Clause of the Constitution, engage in interstate, overseas or foreign air transportation.

The *Belmont* case, *supra*, has no remote application to the questions involved here. That case simply decided that an agreement between the United States and the Soviet Government, with respect to the settlement of claims and counterclaims between them, was valid, as against the asserted policy of the State of New York.

The Court in the *Pan American Airways* case, *supra*, and the Petitioners here, rely upon *United States* v. *Bush*, 310 U. S. 371, for the proposition that the President, and not the Board, is the ultimate arbiter under the law, and that the Board is acting as nothing more than the President's adviser. We presume, therefore, that they perceive some similarity between the certification provisions of the Civil Aeronautics Act and the proclamation provisions of

the Tariff Act. Even a casual examination and comparison of the provisions of these two laws will show that the powers conferred upon the Tariff Commission and the Civil Aeronautics Board, and the functions of the President under each of the Acts are entirely dissimilar.

The pertinent provisions of the Tariff Act [8] are contained in Title 19 U. S. C. Section 1336 relating to Presidential proclamations approving tariff rates. The terms and provisions of this section clearly demonstrate that the Court was entirely correct in its decision in the *Bush* case, *supra*, when it held that the functions of the Tariff Commission were purely advisory. Section 1336 of the Tariff Act provides that in "change of classification or duties," the Commission must first "investigate" differences in the cost of production; that in the course of the "investigation," the Commission "shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings"; that at the conclusion of the investigation the Commission shall "*report* to the President the results of the investigation and its findings"; that its report shall contain certain "statements" by the Commission with respect to *ad valorem* rates, etc., Subsection (c) of Section 1336 provides that, upon the completion of these findings, "The President *shall by proclamation* approve the rates of duty and changes in classification" specified in any *report* of the Commission under this section, if, in his judgment, such rates of duty and changes are "shown by such *investigation* of the Commission to be necessary to equalize such differences in costs of production." (Italics ours).

A comparison of the above provisions of the Tariff Act with the certification sections of the Civil Aeronautics Act shows a distinctly different statutory pattern. Clearly, the Tariff Commission advises, whereas, the Civil Aeronautics

[8] Tariff Act of 1930, 46 Stat. 701, 19 U. S. C. 1336.

Board ordains. The kind of an order that emerges from a hearing before a body with power to ordain is one that affects legal rights in a far different way than a report of a commission which merely investigates and advises. The certification sections of the Civil Aeronautics Act, show that the Board does not "report" or make "recommended findings" to the President. No machinery has been set up, as under the Tariff Act, for the President to "proclaim" the issuance of a certificate. Rather, the Civil Aeronautics Act bestows *solely* upon the Board the power to *make the findings* and *issue the certificates.*

Section 801 does not provide for any participation by the President in the issuance of the certificate. It merely states that the issuance of certain types of certificates "shall be subject to the approval of the President."

Thus, under the Civil Aeronautics Act, the Board is entrusted with the power of making the necessary findings of fact and the issuance of all orders and certificates pursuant thereto. In contrast, under the Tariff Act, the Commission is empowered only to report to the President, who, in turn, is given the power to issue a proclamation by which a change in rates investigated by the Commission is put into effect.

In *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, the Court specifically differentiated the history and procedure of the Tariff Commission from that of "the Interstate Commerce Commission when regulating the conduct or the charges of interstate carriers" (page 317).

III.

WHETHER THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER OF THE BOARD GRANTING THE CERTIFICATE, AND WHETHER THE BOARD ACTED ARBITRARILY IN DENYING WATERMAN'S MOTION TO REOPEN THE CASE TO RECEIVE FURTHER EVIDENCE, ARE QUESTIONS OF LAW WHICH ARE SUBJECT TO JUDICIAL REVIEW.

(a) The Question of Substantial Evidence.

It is argued by the Board that the judicial function does not extend to review of the Board's compliance with the requirements of Section 401 of the Act. The argument, if valid, would lead to absurd results. The Board, under the theory advanced by Petitioners, after a hearing, but without evidence to support its action, could cancel, suspend or revoke the certificate of an air carrier which had been operating in overseas or foreign air transportation for many years, thereby destroying its investments and its business, and could after a hearing, but again without evidence to support its action, grant a certificate to another carrier to operate over the routes for which the certificate had been cancelled, suspended or revoked.

The Board in this case found, and that finding was approved by the President, that the service authorized was required by the public convenience and necessity; it granted a certificate to a carrier that was unfit and unable to inaugurate such service and now it is contended that the courts may not inquire into whether the Board failed to comply with the law in granting the certificate. Aside from the express language of Section 1006(a), it cannot be seriously urged that the Congress intended to confer such unfettered power upon the Board subject only to the approval of the President.

The Congress, foreseeing such a situation as we have here, required that the Board make findings of fact, and provided that such findings must be supported by substan-

tial evidence if they were to form the basis of a valid order. It expressly provided for judicial review to make certain that the Board's orders were based upon the evidence and the law rather than upon arbitrary or extra-legal considerations.

In addition to these considerations, the provisions for review afford a judicial restraint upon the obtaining of certificates by misrepresentation or fraud or other illegal methods. The issuance of certificates of public convenience and necessity to an air carrier usually results in the payment of large sums from the public treasury in the form of compensation for the transportation of mail. No such element is present with respect to the issuance of permits to foreign air carriers by reason of the provisions of Section 406(f) of the Act. Therefore, the Congress provided that such permits issuable to foreign air carriers shall be approved by the President and shall not be subject to judicial review.

At the hearing in the *Latin American Case*, C & S submitted an exhibit showing, on the route sought to be served by it between New Orleans, Louisiana, and San Juan, Puerto Rico, an estimated annual profit before mail pay of some $435,000 (R. 373). The exhibit showed the estimated cost of operating DC-4 equipment over such route, upon an additional expense basis, to be 117.92c per mile[9] (R. 373). Its president testified that, on the basis of these estimates, C & S would be willing to undertake the operation of the service sought over said route with mail pay at the rate then received by it, namely, 60c per ton mile. This rate involves very little subsidy. (R. 374) Waterman had proposed to inaugurate and maintain a service between New Orleans and San Juan, supplemental to its steamship service, *without* mail pay. The Board has frequently held that it is important to ascer-

[9] The final exhibit offered by C & S on this point showed an estimated profit before mail pay of approximately $300,000 per annum, and an operating cost estimated at $1.28 per mile.

tain within reasonable limitations the cost to the Government of the proposed operation in the form of compensation for the transportation of mail, and that, unless exceptional circumstances exist in a given case, the relationship between estimated commercial revenues and operating costs of the proposed service should not initially impose upon the Government an unduly large proportion of the total operating costs. (*Pennsylvania Central Airlines Corp.*, 2 C. A. B. 207, and *Northwest Airlines, Inc.*, 1 C. A. A. 573). That the Board relied upon the representatives of C & S in this case, and that the Board's order granting the certificate of public convenience and necessity to C & S was based in substantial part upon this evidence, is shown in the Board's finding that: (R. 208)

> ". . . Although it is not likely that the New Orleans-San Juan service will require any substantial subsidy payment, especially if it is conducted as a part of an independent airline system, the considerations advanced by Waterman would carry substantial weight if Waterman alone were an applicant."

Moreover, the record shows that the Board in issuing its order granting the certificate of public convenience and necessity to C & S, relied upon the representation by C & S in its application that it was

> ". . . fit, willing, able *and ready to,* and is properly equipped, organized, staffed and financed, to properly perform adequate and safe air transportation services over said routes." (R. 3)

This is clearly demonstrated by the fact that the motion of Waterman to reopen the *Latin American* case to receive further evidence and for reargument, was denied by the Board upon the ground, among others (R. 21):

> "2. That evidence related to air traffic during the war period and the present transition period does not form a sufficient basis for an estimate of future air traffic to warrant the reopening of this proceeding,

particularly in view of the delay which would result and which would interfere with the institution of new services to Puerto Rico and other points, and that it is in the public interest to issue as promptly as possible a decision in this proceeding . . .".

Even now C & S in its brief (p. 43) urges that the reason for the rule of the Board to the effect that no petition for rehearing shall operate as a stay of the effective date of the order sought to be modified or vacated by the petition, unless so ordered by the Board, is that certificates of public convenience and necessity are awarded to fill special needs. "In a great many instances" argues C & S (Brief, p. 43) "the need is a matter of emergency. It is, therefore advisable, if not imperative, that the legal delays requisite to due process be cut to a minimum to assure the public the earliest possible service. It is conceivable that the inauguration of service might be endlessly postponed by the dilatory tactics of an opponent to an award." In view of the representations upon which C & S obtained its certificate from the Board in this case, and events which followed almost immediately following the issuance of the certificate, that argument is sheer sophistry.

The order granting the certificate of public convenience and necessity to C & S, and the order denying Waterman's Motion to Reopen the Proceeding to Receive Further Evidence were served on Waterman May 24, 1946. On June 10, 1946, less than three weeks later, C & S filed with the Securities and Exchange Commission a prospectus relating to the sale of 170,000 shares of common stock voting trust certificates in which the following statement appears: (R. 366)

> "The company, however, can make no prediction either *with respect to the time within which operations will commence along these new Caribbean routes* or with respect to the time when operation over such routes will be profitable." (Italics ours)

On October 11, 1946, C & S filed with the Board a "Petition for Establishment of Mail Rate" (R. 375) in which it represented that the estimated cost of operating DC-4 equipment on the New Orleans-Havana segment of the route which had been awarded to it, would amount to—not 128 cents per mile, as it had represented when seeking the certificate—but to 286.88 cents per mile; that it would require a total mail pay—not of 60 cents per ton mile as it had represented when seeking the certificate—but of 173 cents per airplane mile (R. 383). C & S, in such petition, alleged further (R. 378, 379):

> "... that unless a temporary rate of compensation for the transportation of mail is fixed shortly after the inauguration of service over said segment of its foreign route, Petitioner, in view of the operating expenses applicable to the operation of its routes, the expenditure of funds required for the purchase of new equipment, and the facilities related thereto, will be compelled to seriously impair its working capital; ..."

Notwithstanding the representations of C & S made to induce the Board to grant it a certificate and the urgency with which the Board viewed "the institution of new services to Puerto Rico and other points" in denying Waterman's Motion for Reopening the Proceeding to Receive Further Evidence, services have not yet been inaugurated by C & S beyond Havana, because, as Waterman alleged in its motion, C & S was not fit, willing and able to perform the proposed services as required by Section 401 of the Act.

It clearly appears from the record before this Court that, during the pendency of the motion of Waterman to reopen the proceeding, and at the very moment that C & S was opposing said motion and asserting that "Chicago and Southern has amply demonstrated that it is fit, willing and able to provide any services authorized for this company in this proceeding" (R. 111), it had in preparation, for filing with the Securities and Exchange Commission,

a prospectus in which it admitted its inability to commence the service for which it had applied.

This review shows clearly that the facts with respect to the inability to inaugurate the authorized service were known to the Board at the time it denied Waterman's Petition for Rehearing, by its Order Serial No. 4977, dated July 12, 1946. It also showed that C & S at the time the Certificate was issued, was aware of the fact that it could not inaugurate and maintain the service on the basis of the representations made by it to the Board at the time of the hearing. Therefore, it must be concluded that (a) C & S obtained the certificate upon the basis of gross misrepresentation and without substantial evidence to support the Board's findings, or (b) that conditions with respect to the traffic potential as represented by C & S, the operating revenues and expenses as represented by it, its financial ability to inaugurate and maintain the proposed service, and the rate of compensation for the transportation of mail which would be required by it, had changed so drastically that the record made in 1944 could furnish no adequate basis for the action of the Board in May, 1946.

Either or both of these propositions present a question of law as to whether the Board complied with the requirements of the statute in its decision and order granting the certificate to C & S, and whether it acted arbitrarily in denying Waterman's motion to reopen the case, and its petition for a rehearing.

As stated by Mr. Landis, Chairman of the Board, on March 3, 1947, in an opinion in C. A. B. Docket No. 2564, Serial Number E-337, "It is difficult to believe that the Board would have certificated this route had the present estimates been those upon which Chicago and Southern sought the application."

The observation of Chairman Landis is particularly significant in the light of one of the reasons assigned by

the Board for denying Waterman's Motion to Reopen the Proceeding to Receive Further Evidence (R. 21):

> "(5) that the cost of new air services in the form of air mail compensation is only one of the facts considered by the Board in certificating such services, and . . . the amounts of such compensation paid in the past and required in the future by other applicants were facts known at the hearing and considered by the Board."

(b) The Question of Changed Conditions.

In this case, the allegations of changed conditions upon which Waterman's petition to reopen the *Latin American* case was based no longer need depend upon general assertions of drastic changes in world affairs as evidenced by facts of which the Court may take judicial notice. Here we have the formal opinions of the Civil Aernonautics Board itself that conditions had so drastically changed as to warrant an attempt by it to justify the failure of C & S to inaugurate the service authorized by the certificate sought to be reviewed, and a complete disregard of the representations made to the Board by C & S in order to obtain the certificate.

On March 3, 1947, the Board, by its Order Serial No. E-337, fixed a base rate of 95 cents per airplane mile as the temporary rate of compensation to be paid to C & S on the New Orleans-Havana segment of the San Juan route.

In the opinion concurring in the issuance of such Order, Mr. Ryan, Vice-Chairman of the Board, stated (Order Serial No. E-337, Docket No. 2564, dated March 3, 1947):

> "The carrier has asked for a mail rate on the New Orleans-Havana segment of its Caribbean route *substantially in excess of that anticipated at the time of the decision in the Latin American case in which this route was awarded.*"

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"While the present costs on the New Orleans-Havana route appear to be substantially higher than those estimated at the time the service was authorized, they certainly are not higher than those experienced by our pioneer carrier in the Caribbean during the initial period of its operation." (Italics ours).

On the same date, March 3, 1947, the Board, by its Order Serial No. E-338, in C. A. B. Docket No. 2834, instituted a proceeding to determine whether any portion of the Latin American route awarded to C & S should be suspended.

Mr. Branch, a member of the Board, in an opinion concurring in that Order, stated (Order Serial No. E-338, Docket No. 2834, dated March 3, 1947):

"The disparity between the anticipated costs to the Government through mail payment at the time the route was certificated and the amounts now estimated to be required to enable the carrier to operate the service is so great as to pose the problem whether the public need for the service at this time is sufficient to justify the financial burden which inauguration of the service will impose upon the Government." (Italics ours).

. . . . . .

"In its opinion in the Latin American Case, Docket No. 525, the Board stated that it was not likely that the New Orleans-San Juan service would require any substantial subsidy payment especially if conducted as a part of an independent airline system. During the period intervening between our decision in that case and the inauguration by Chicago and Southern of its international service between New Orleans and Havana a number of adverse economic factors have developed, not only with respect to this carrier but with respect to the industry generally. There has been a very substantial increase in costs. In addition, in some instances carriers over-estimated their equipment needs and personnel requirements. . . . (Italics ours).

"Not only have these adverse factors affected to a substantial degree the Chicago and Southern Carib-

bean operation but they have also affected its domestic operation, thus augmenting the strain upon the carrier's financial condition."

Mr. Lee, a member of the Board, in an opinion dissenting from the decision to order such investigation, stated (Order Serial No. E-338, Docket No. 2834, dated March 3, 1947):

> "*A major difference between the situation when the Board originally certificated these routes and the present situation is a general increase in the price level in materials and services with no corresponding increase in rates.* The cost of all materials and services has increased to the extent that a comparison between the revenues of the carrier from rates, which have been held at the same level as they were when the certificates were originally issued, and the costs, which have increased considerably, presents a darker picture than that presented to the Board in its original decision." (Italics ours).

Chairman Landis, in an opinion dissenting from the Board's Order of March 3, 1947, fixing a temporary mail rate on the New Orleans-Havana segment of the route authorized by it, reviewed at length the conditions which existed and the representations of C & S with respect to costs of operation and mail pay required when seeking the certificate, as compared with conditions which existed and the representations of C & S after the certificate was issued. He said (Order Serial No. E-337, Docket No. 2564, dated March 3, 1947):

> "Prior to inauguration of any service by Chicago and Southern that carrier on October 11, 1946, applied to the Board for the establishment of a provisional rate of mail compensation of $1.73 per airplane mile. This petition was amended on November 14, 1946, to increase the requested rate to $2.17 per airplane mile for the Havana segment the petitioner alleging that certain miscalculations had been made to its dis-

advantage in the original petition. On January 28, 1947 the Board issued an order to show cause why it should not fix a temporary rate of 50c per airplane mile for the carrier's entire international route. This rate was admittedly not based on operating costs of this carrier but was a temporary measure fixed by reference to the highest rates theretofore established by the Board for substantially similar service in the Caribbean area. On February 6, 1947, Chicago and Southern petitioned for reconsideration of this temporary rate order. It still asked for $2.17 per airplane mile for the New Orleans-Havana segment, which is the only one now in operation, and for $1.64 per airplane mile when the service was extended beyond Havana to San Juan."

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"These per airplane mile figures to the uninitiated give little sense of the overall costs of the operation. But, as translated by Chicago and Southern its estimate for mail pay for the New Orleans-Havana segment would be about $750,000 per year for one daily DC-4 round trip over that route. Extending this operation to San Juan would, according to their estimates, cost the Government in mail pay about $1,800,000 per year and, extending it to Caracas gave a total mail pay estimate of $3,400,000. These estimates are based upon their latest requests and upon a load factor of between thirty and forty per cent, seemingly considerably in excess of the latest reported traffic, which reflects the peak season on this route and which is likely to fall off during the summer months.

"*These estimates are in striking contrast to those originally submitted by Chicago and Southern during the Latin American case.* The estimates of revenues and direct costs on the international route then put into the record, after allowance for allocation of system costs as claimed by Chicago and Southern in its mail rates petition, reflect a break-even need of 19c per plane mile for DC-4 equipment and 22c for DC-3 equipment. Chicago and Southern, however, through its president contended that it could fly the route with merely compensatory mail pay, presumably 60c per ton mile, the rate then in effect throughout its domes-

tic system. In passing it can be observed that the mail actually being carried on this route is exceedingly light, *and that under the rate of $1.77 requested by the carrier the cost to the Government of carrying this mail would be over $700 per ton mile.* (Italics ours).

"Though the Board in dealing with applicants' estimates as to costs and mail pay required to fly any route must necessarily be morosely sceptic, the general level of original estimates unquestionably has an influence with the Board. This was true in the Latin American case. There, in selecting Chicago and Southern as the carrier for this route in preference to another applicant the Board stated: 'Although it is not likely that the New Orleans-San Juan service will require any substantial subsidy payment especially if it is conducted as a part of an independent airline system . . .' P. 58.

"It is difficult to believe that the Board would have certificated this route had the present estimates been those upon which Chicago and Southern sought the application."

* * * * * * *

". . . Chicago and Southern's costs for DC-4 operation seem extraordinarily high. Originally they stood at $2.80 per mile; as revised they come to $2.62. The average costs after allowing for an allocation of ground and indirect costs for all DC-4 international operators is only $2.48 per revenue plane mile. This includes operations over such routes as the North Atlantic where costs are necessarily higher because of the necessity for relief crews and other matters. A more appropriate comparison is DC-4 costs of all domestic operators that stand at $1.48 per revenue plane mile. The operation from New Orleans to Havana, apart from gasoline taxes charged by Cuban authorities and the landing fees paid to Pan American in Havana, is of a nature that should compare with these. But it almost doubles them.

"Again, Chicago and Southern is in difficulty with regard to its domestic operations. Domestically it seeks mail pay which would aggregate almost $4,000,000 as against some $215,000 it received during the past year. It further states in a petition filed with

the Board on December 20, 1946, that unless some temporary relief is forthcoming it 'will be without cash funds sufficient to carry on operations on or about February 1, 1947.' If its allegations be accepted as true, Chicago and Southern, irrespective of such action as may be taken on its international route, is threatened with bankruptcy because of its domestic operations unless very substantial and immediate relief in the form of mail pay is forthcoming. To permit it to continue operations on an international route which to all appearances can only be a constant drain on its already weakened resources seems a highly questionable policy for it to pursue or for the Board to permit it to pursue. Bankruptcy of a carrier engaged in international operations does not enhance the prestige of the United States. Nor does it seemingly discharge those high responsibilities placed upon carriers certificated to carry the American flag abroad."

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"In the award of routes the Board is governed by considerations dealing with the public convenience and necessity. The need for a service, the traffic potentials, probable costs of the service and many other factors enter into that conclusion."

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"Of course, initial costs, higher than anticipated, should not be necessarily lead to the conclusion that an original award was erroneous, but the situation seemingly presented here gives no assurance of foreseeable improvement. Contrariwise, the carrier has assured us that the costs it has projected are not likely to be reduced but may increase. Optimism under these circumstances seemingly has an insecure foundation."

These statements of members of the Board show that at the time the Board denied Waterman's motion to reopen the Latin American case, conditions had changed to such an extent as to bring the motion within the principle of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States, supra.*

Thus, it is clear from the record made by the Board itself that while there is a public need for an air transportation service between New Orleans, Louisiana, and San Juan, Puerto Rico, the areas served by these gateways are being deprived of such service by reason of the fact that the Board granted a certificate to an applicant which on the basis of the facts did not meet the test of fitness, willingness and ability to perform the transportation services authorized by the certificate, as required by law.

It is respectfully submitted that the very purpose of judicial review of the Board's orders is to prevent the granting of certificates in cases such as we have here.

IV.

"CASE" OR "CONTROVERSY"

The Petitioners here assert that because of Section 801 any judgment rendered by the Court would be without finality and conclusiveness because the President is authorized to approve or disapprove subsequent action which might be taken by the Board in conformity with the Court's decision. This amounts to an argument that the Board may, as it has done here, grant a certificate to an air carrier without regard to the requirements of the statute and because the President approves the Board's order granting the certificate, judicial review would be futile because the Board and the President might again reach the same conclusion.

Such an argument is utterly without merit. It is perfectly possible that upon demand the Board will come to the same conclusion as it did in the first instance, as it is possible in almost any case of review of the decision of a board or commission. But that fact does not nullify the power of the courts to review actions of an administrative agency. Certainly no greater futility could be imagined than for the Board to determine that a public need existed for an air transportation service and, in disregard of the

law, to certify a carrier which is unfit and unable to inaugurate and maintain the service. The public convenience and necessity is the primary test as to whether an air transportation service shall be inaugurated. In this case the public is being deprived of a needed service because of the Board's arbitrary action in certifying an unfit carrier, in disregard of statutory requirements, and the argument that the courts may not review the Board's determination for the reason that it may again reach the same conclusion is wholly untenable.

The law is well established that such fact does not deprive the courts of the power to review actions of an administrative agency.

The provisions of the Civil Aeronautics Act with respect to judicial review are similar to those of the Federal Trade Commission Act.[10] The language of the Court in *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co., supra,* is in point (p. 276):

> "... Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are apppropriate questions for judicial decision. These are questions of law upon which the Court is to pass."

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[10] Act of September 26, 1914, c. 311, 38 Stat. 719, 43 Stat. 939, 52 Stat. 111, 52 Stat. 1028, 15 U. S. C. 45.

The argument advanced by Petitioners here is almost identical with one rejected by the Court in *Federal Power Commission* v. *Pacific Power and Light Co., et al.*, 307 U. S. 156. The Federal Power Commission in that case contended that an order denying an application of a public utility for permission to sell its assets was not reviewable because only the Commission, and not the Court, could relieve from the statutory prohibition. The Court in that case used language which clearly supports our position: (pp. 159, 160)

"But it is urged that review of the Power Commission's order does not present a 'Case' or 'Controversy,' because the court itself cannot lift the prohibition of the statute by granting permission for the transfer, nor order the Commission to grant such permission. And so it is claimed that any action of a court in setting aside the order of the Commission would be an empty gesture, since without permission a transfer would be unlawful. But this proves too much. In none of the situations in which an action of the Interstate Commerce Commission or of a similar Federal regulatory body comes for scrutiny before a Federal court can judicial action supplant the discretionary authority of a commission. A federal court cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices. *So here it is immaterial that the court itself cannot approve or disapprove the transfer. The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. '. . . a judgment rendered will be a final and indisputable basis of action between the commission and the defendant.' Interstate Commerce Comm'n v. Baird,* 194 U. S. 25, 38, 48 L. ed. 860, 866, 24 S. Ct. 563. *In making such a judgment the court does not intrude upon the province of the Commission, while the constitutional requirements of 'Case' or 'Controversy' are satisfied.* For purposes of judicial finality there is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so." (Italics ours.)

Petitioners contend that the Court, if it reviews the orders, would be without power to render a judgment with finality and conclusiveness because the President nevertheless would be required to approve or disapprove subsequent action by the Board. It is equally true that Congress might decline to appropriate funds to satisfy judgments of the Court of Claims, but that hypothetical possibility could not render the Court of Claims' actions beyond the scope of judicial power. *United States* v. *Jones*, 119 U. S. 477. As pointed out by the Court below, "Courts try criminal cases notwithstanding an executive pardon may frustrate a conviction. They constantly reach conclusions in all kinds of cases undeterred by the chance that a higher court may disapprove their orders." (R. 412).

The reasoning in the *Pacific Power* case, *supra*, is directly in point. A decision by the Court that the Civil Aeronautics Board construed the statute erroneously or made findings unsupported by the evidence will be "a final and indisputable basis of action" as between the Respondent here and the Board. The Constitutional requirement of "case" or "controversy" is only that there shall be a real issue between the parties which the Court is in a position to settle. There can be no doubt but that there is a real issue between the Petitioners here and Waterman, which the Court is in a position to settle with complete finality. (*Maryland Casualty Co.* v. *Pacific Coal and Oil Co.*, 61 S. Ct. 510, 312 U. S. 270; *Nashville, C. & St. L. Railway Company* v. *Wallace*, 288 U. S. 249; *Gully* v. *Interstate Natural Gas Company, Inc.*, 82 F. (2d) 145 (C. C. A. 5th); *Columbian National Life Insurance Company* v. *Foulke*, 89 F. (2d) 261 (C. C. A. 8th).

As already stated, the Act prescribes that certificates authorizing overseas and foreign air transportation shall be issued by the Board and not by the President. True, such certificates are subject to the approval of the President. This does not mean that the President has power to determine which carrier shall be certificated for overseas

air transportation. That determination is made by the Board, for only it can determine whether a particular applicant has complied with the legislative standards set up by Congress.

An issue is clearly raised by the allegation that the Board's order granting the Certificate to C & S was without substantial evidence. The conflicting contentions of the parties here present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. A "case or controversy" is before this Court. *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, and cases therein cited. *Re Clyde Wilson Summers*, 325 U. S. 561.

The Court stated in *Federal Radio Commission* v. *Nelson Bros. Co., supra:* (p. 278)

> "'It is not important,' we said in *Old Colony Trust Co.* v. *Commissioner of Internal Revenue, supra*, 'whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law.' Nor is it necessary that the proceeding to be judicial should be one entirely *de novo*. *When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power.* The provision that, in case the Court reverses the decision of the Commission, 'it shall remand the case to the Commission to carry out the judgment of the Court' means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law. The procedure thus contemplates a judicial judgment by the Court of Appeals and this Court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous. (Citing cases.)" (Italics ours).

In the present case, it is clearly demonstrated that the Board acted outside the scope of its authority by its finding that C & S was fit, willing, and able to perform the services authorized.

It is well established that under such circumstances the Court has jurisdiction to review errors of law outside the Board's final say so. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).

V.

THE PETITION FOR REVIEW WAS TIMELY.

C & S urges that Waterman has lost any right to a review of the decisions and orders of the Board for the reason that the Petition was not filed within sixty days of the date of the orders granting the certificate and denying Waterman's Motion to Reopen the Proceeding to Receive Further Evidence. It is well established by the decisions that the courts cannot be resorted to for the adjudication of an administrative question, the determination of which has not been completed by an agency having jurisdiction of it for that purpose. *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477; *Southland Industries* v. *Federal Communications Commission*, 99 F. (2d) 117. There is no principle of administrative law that is better settled than the rule that no review may be had until administrative remedies have been exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540.

The rules of the Board provide that (R. 343):

> "Any party may petition for rehearing, reargument, or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board.
>
> "The matters of record claimed to have been erroneously decided must be specified, and the alleged errors, and the grounds relied upon must be briefly and specifically stated in the petition."

The latter provision of the rules is in conformity with the provisions of Section 1006(e) that "no objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority . . .".

The only method by which such objections to an order of the Board may be urged before the Board is by a petition for rehearing, after the order has been entered.

Moreover, the rule is well settled that the filing of a petition for rehearing will suspend the running of the period within which an appeal may be taken or petition for review may be filed, and that this period then begins to run anew from the date on which final action is taken by the administrative agency having jurisdiction of it for that purpose. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131; *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2d) 554.

The Board in this case did not complete final action upon the questions before it until the order denying Waterman's Petition for Rehearing. In fact, in the same order, Serial No. 4977, the Board ordered that the proceeding be reopened for the purpose of further argument before the Board and reconsideration by it of its order of May 17, 1946, Serial No. 4793, with respect to (a) the denial of the applications of Colonial Air Lines, Inc., Eastern Air Lines, Inc. and National Air Lines, Inc., insofar as they proposed through service between Balboa, C. Z. and cities in the eastern part of the United States via certain intermediate points, and (b) the denial of the applications of Pan American Airways, Inc. insofar as they proposed service to Curacao, N. W. I. on its Miami-Caracas route, and at Havana, Cuba, on its Miami-Kingston-Balboa route.

The Board might have granted the petition of Waterman for a rehearing by the same order. Therefore, the administrative process was not completed until the Board disposed of Waterman's motion. There was no final order of the Board in this case until July 12, 1946, when it re-

opened the case for the purposes stated above and denied Waterman's petition for reconsideration.

The precise question raised by C & S was before the court in *Braniff Airways, Inc.* v. *Civil Aeronautics Board (Essair Inc. Intervenor)*, *supra*. The contention now urged by C & S was rejected. The court stated (page 153):

> "Essair contends that the order was not stayed, and that it was therefore necessary to file the petition within sixty days of the date of the order. But we cannot review an order until administrative remedies have been exhausted. For purposes of review, therefore there was no final order until the rehearing was denied. (Citing case.) It follows that the present petition was timely."

That decision is in accord with the purpose in authorizing the Board to provide the administrative remedy of a rehearing. The object of statutes or rules providing for or authorizing petitions for rehearing is to afford opportunity to administrative agencies to correct errors or to hear newly discovered evidence before a review. If the statute here be construed so that a petition for rehearing does not suspend the running of the statutory period for filing a petition for review, the administrative benefit to the Board of such petitions may well be destroyed and its rules with respect thereto nullified.

The cases relied upon by C & S, *United States* v. *Abilene & S. R. Co.*, *supra*, and *Levers* v. *Anderson*, 326 U. S. 219, are not authority for the proposition asserted by it. These cases merely hold that under the circumstances there it was not necessary to file a petition for rehearing before resort was had to the courts. Therefore, under the decisions the contention of C & S that Waterman's Petition for Review was not filed in time must be rejected.

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

BON GEASLIN,
Attorney for Waterman Steamship Corporation.

Of Counsel:

FRANCIS H. INGE,
JOSEPH M. PAUL, JR.

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